

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION**

X TECHNOLOGIES, INC.,

Plaintiff,

v.

MARVIN TEST SYSTEMS, INC.,

Defendant.

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Civil Action No. SA-10-CV-319-XR

ORDER ON ATTORNEY FEES

On this date, the Court considered Plaintiffs' Motion for Attorney's Fees against Defendant (Docket no. 173). After consideration of the motion, the record, and the applicable law, the Court GRANTS IN PART Plaintiff's motion for attorney's fees.

Plaintiff requests total attorney fees in the amount of \$729,930.04, and specifies attorney fee rates ranging from \$235 and \$495. Attorneys' fee awards are governed by state law in federal diversity cases. *Mid-Continent Cas. Co. v. Chevron Line Co.*, 205 F.3d 222, 230 (5th Cir. 2000). Recovery of attorneys' fees requires the Plaintiff to prove that the fees were reasonable and necessary for the prosecution of the case. *Arthur Andersen & Co. v. Perry Equip. Corp.*, 945 S.W.2d 812, 818-19 (Tex. 1998). As Plaintiff was represented on an hourly fee basis, fees are determined via the lodestar method of multiplying the number of hours reasonably expended by a reasonable hourly rate. *See Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983).

Plaintiff's counsel's rates exceed the average billing rate for attorneys in San Antonio. Mr. Fleming became licensed to practice law in 1980. Mr. O'Donnell has been licensed to practice law since 1997. Ms. Kanusky has been licensed to practice law since 1994. All three attorneys possess

significant litigation experience. The 2009 median hourly rate, however, for large San Antonio firms is \$400. Mr. Stribling and Ms. Senary have been licensed to practice law for less than two years, and the average hourly rate in San Antonio for an attorney who has practiced less than two years is \$188. Mr. Smith has been licensed to practice law since 2006, and the average hourly rate in San Antonio for an attorney who has practiced for three to six years is \$193.

Defendant objects not only as to the hourly rates, but the number of hours expended as excessive. First, Defendant argues that Plaintiff failed to segregate its successful claims from its time expended on unsuccessful claims. *Tony Gullo Motors I, L.P. v. Chapa*, 212 S.W.3d 299, 313-314 (Tex. 2006) (“if any attorney's fees relate solely to a claim for which such fees are unrecoverable, a claimant must segregate recoverable from unrecoverable fees. Intertwined facts do not make tort fees recoverable; it is only when discrete legal services advance both a recoverable and unrecoverable claim that they are so intertwined that they need not be segregated.”). That objection is overruled. The unsuccessful claims in this case were so intertwined with the breach of the teaming agreement claim that the fees were not required to be segregated. Secondly, Defendant argues that counsel either over prepared the case or failed to exercise billing judgment. Those objections are overruled. This case was highly contentious and aggressively defended, which required a commensurate aggressive prosecution.

Finally, Defendant argues that jury only awarded \$336,000 in damages and that the requested fee is excessive to the amount in controversy. The Court has carefully reviewed this objection and the attorney fee application submitted by Plaintiff. The Court adjusts the fee as follows:

Timekeeper	Hours submitted	Original Hourly Rate	Fee Request	Revised Rate	Court approved Fee
O'Donnell	233.52	470	109752.05	400	93408
	517.29	495	256059.28	400	206916
	24	495	11880	400	9600
Fleming	36.75	450	16,536.38	400	14700
	252.43	495	124,950	400	100972
	2	495	990	400	800
Stribling	220.41	235	51796.94	200	44082
	400.6	295	118176.26	200	80120
	23.25	295	6858.75	200	4650
Senary	114.31	240	27,435	200	22862
	2.75	240	660	200	550
Smith	6.25	350	2187.5	200	1250
	6.3	395	2488.5	200	1260
Kanusky	0.38	425	159.38	400	152
	1840.24		729930.04		581322

As revised by the Court, the attorney fee award is \$581,322. Given the complexity of the legal and factual issues in this case, and the highly contentious nature of this lawsuit, this award is reasonable.

It is so ORDERED.

SIGNED this 13th day of February, 2012.



XAVIER RODRIGUEZ
UNITED STATES DISTRICT JUDGE